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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 425.

BIRMINGHAM ICE AND COLD STORAGE COMPANY
and SHAW WAREHOUSE COMPANY,
Appellants,

vs.

SOUTHERN RAILWAY COMPANY et al.,
Appellees.

MOTION

Of Appellees, Southern Railway Company and Georgia Industrial Realty Company, to Dismiss or, in the Alternative, to Affirm.

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MOTION

Of Appellees, Southern Railway Company and Georgia Industrial Realty Company, to Dismiss or, in the Alternative, to Affirm.

Southern Railway Company and Georgia Industrial Realty Company, appellees in the above-styled cause, pursuant to Rule 16 of the Revised Rules of this Court, move that the appeal attempted to be taken herein by Birmingham Ice and Cold Storage Company and Shaw Warehouse Company, intervenors, be dismissed on the ground that the appeal is not within the jurisdiction of this Court; and in the alternative, these appellees move that the judgment of the District Court be affirmed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT.

I

Argument in Support of Motion to Dismiss Appeal.

This appeal should be dismissed because, although the appellants state that jurisdiction of the appeal is believed to be conferred by 49 U. S. C., § 45 (the Expediting Act), that statute does not authorize a direct appeal to this Court in an action seeking solely to recover money or a penalty. *United States v. New York, N. H. & H. R. R.*, 276 F. 2d 525, 543 (2nd Cir. 1960); see *United States v. Interstate Commerce Comm'n*, 337 U. S. 426, 441-443 (1949).

That this case involves only an attempt to recover money or a penalty is clearly revealed by the "questions presented" stated in the appellants' brief. Although the amended complaint of the United States and the complaint in intervention (which was never amended to conform with the amended complaint of the United States) both sought relief other than the recovery of money, the appellants do not here complain that such other relief was not granted, and indeed, the United States has not even joined in the appeal. The fact of the matter is that all of the other relief sought by the United States and the intervenors was granted. It is true that certain injunctive relief was sought (and all granted), but it was merely ancillary to the efforts of both the United States and the intervenors to compel the collection of back rent. Compare *United States v. St. Regis Paper Co.*, 285 F. 2d 607, 610 (2nd Cir., 1960), *affirmed*, 365 U. S. 857 (1961).

The burden of the intervenors' complaint here is that the District Court did not require their competitor, appellee Jefferson Warehouse and Cold Storage Company, and its principal stockholder, appellee W. C. Hudlow, Jr., to pay as much back rent as the intervenors think the competitor should have been required to pay. In addition, the intervenors seek to extract from their com-

petitor a treble forfeiture under the Elkins Act (49 U. S. C., § 41 (3)), although the United States did not seek such relief. It is apparent on the face of the appellants' jurisdictional statement that this appeal involves merely an action to recover money or, in the alternative, a penalty and that this appeal is not proper under the Expediting Act. That statute was designed "to ensure speedy disposition of suits in equity brought by the United States", *United States v. California Co-operative Canneries*, 279 U. S. 553, 558 (1929), and to interpret the words of the act "in every civil action" to include actions for the payment of money "would indeed be absurd literalism." *United States v. New York, N. H. & H. R. R.*, *supra*; 276 F. 2d at 543.

II.

Argument in Support of Alternative Motion to Affirm the Judgment of the District Court.

Although these appellees earnestly contend that this appeal should be dismissed, even if the judgment of the District Court were appealable directly to the Supreme Court under the Expediting Act, the judgment should be affirmed, since it is manifest that the questions presented, as set out in the jurisdictional statement of the appellants, are so lacking in substance as not to require further argument or consideration by this Court.

The first three "questions presented" involve the decision of the trial court as to how much back rent, under a very complicated set of facts, should be required to be paid by Jefferson Warehouse and Cold Storage Company and its principal stockholder, although the appellants attempt to frame them as questions of law. On the basis of a voluminous record of exhibits and oral testimony and without the intervention of a jury, the District Court determined that a very substantial amount of back rent should be paid and granted other relief designed to eliminate any concessionary practices. District Judge Lynne,

who tried the case, also sat in several prior cases (referred to in the jurisdictional statement) involving the same general controversy between the same parties and is familiar with all background facts and issues. The appellants have suggested no reason whatsoever why this Court should reconsider a factual record already thoroughly canvassed by a trial court so conversant with this involved and complex matter. It is significant that the United States has not appealed from the decision of the trial court and has not even joined in this appeal. We respectfully submit that this Court should decline to review the decision of the lower court on the facts.

The fourth question presented involves the appellants' complaint that the trial court did not permit them to bring in as a third party defendant Chattanooga Warehouse and Cold Storage Company and did not permit discovery with reference to that Company.

Even if the appellants had a right to intervene, which we deny, Rule 14 of the Federal Rules of Civil Procedure permits third party practice only by "plaintiffs" and "defendants" and does not include intervenors (see *Chandler & Price Co. v. Brandtjen & Kluge, Inc.*, 296 U. S. 53, 58-59 (1935)), and in any event, it is clear from the terms of Rule 14 that even a plaintiff may cause a third party to be brought in only "[w]hen a counterclaim is asserted against" the plaintiff. No claim of any sort has ever been asserted against the intervenor-plaintiffs in this action.

Finally, the decision whether to allow a party to implead an additional party rests in the sound discretion of the trial court, *General Taxicab Ass'n v. O'Shea*, 109 F. 2d 671 (D. C. Cir. 1940), and in the absence of any claim that the trial court abused that discretion, the decision of the trial court should not be reviewed.

As to the appellants' complaint that their discovery was limited, the scope of discovery, including the scope of written interrogatories, is within the sound discretion of

the trial court and will not be disturbed by the court on appeal in the absence of clear abuse of discretion by the trial court. *Newell v. Phillips Petroleum Co.*, 144 F. 2d 338 (10th Cir. 1944); *United States v. Kohler Co.*, 9 F. R. D. 289 (E. D. Pa. 1949); see *Bell v. Swift & Co.*, 283 F. 2d 407 (5th Cir. 1960). Since the appellants do not claim that the District Court abused its discretion in limiting discovery, this Court should decline to review its action.

CONCLUSION.

These appellees move that the appeal be dismissed because of lack of jurisdiction and, in the alternative, move that the judgment below be affirmed on the ground that it presents no question sufficiently substantial to warrant review by this Court.

Respectfully submitted,

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Certificate of Service.

I, Joseph F. Johnston, one of the attorneys for Southern Railway Company and Georgia Industrial Realty Company, appellees herein, and a member of the Bar of this Court, hereby certify that on this ..... day of October, 1962, I have served copies of the foregoing Motion to Dismiss or Affirm on each of the parties to this appeal, and on the United States, the original plaintiff below, by mailing a copy thereof in a duly addressed envelope, first-class mail, postage prepaid, to their attorneys of record as follows:

1. Mr. David J. Vann,
White, Bradley, Arant, All & Rose,
2100 Comer Building,
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Attorney for the Intervenor, Birmingham Ice and Cold Storage Company;

2. Mr. A. Alvis Layne,
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Pennsylvania Building,
Washington 4, D. C.;
Attorney for the Intervenor, Shaw Warehouse Company (by Air Mail);

3. Mr. Glenn Elliott,
Attorney at Law,
Sterick Building,
Memphis, Tennessee,
Attorney for the Appellees, W. C. Hudlow, Jr., Jefferson Warehouse and Cold Storage Company and Birmingham Terminal Cold Storage Company;

4. Hon. Macon L. Weaver,
United States Attorney,
Federal Building,
Birmingham, Alabama;

5. Hon. Archibald Cox,
Solicitor General of the United States,
Justice Department,
Washington 25, D. C.; and

6. Mr. Daniel M. O'Donoghue,
Attorney,
Bureau of Inquiry and Compliance,
Interstate Commerce Commission,
Washington 25, D. C.,
Attorneys for the Original Plaintiff, the United States of America (by Air Mail to Messrs. Cox and O'Donoghue).

.....
Attorney for Appellees, Southern Railway Company and Georgia Industrial Realty Company.